JOSEPH JEGANATHAN

v.

ROSALINE JOSEPH

HIGH COURT MALAYA, ALOR SETAR
KC VOHRAH J
[DIVORCE PETITION NO. 47-11-86]
22 MAY 1989

FAMILY LAW: *Sections 53(1), (2), 54(1)(b) of the Law Reform (Marriage & Divorce) Act 1976 - Marriage - Irretrievably broken down - Whether can reasonably be expected to live together - Inquiry into facts and circumstances - "Just and reasonable" - Interests of child or children.*

The petitioner - husband by a petition seeks dissolution of his marriage. Both petitioner and respondent are Catholics and were married at a church in 1959. They had 2 children, both adults now, from the marriage. The petitioner claims the marriage has broken down irretrievably grounding his petition for divorce under s. 53(1) of the Law Reform (Marriage & Divorce) Act 1976. He had also relied on s. 54(1)(b) thereof that his wife had behaved in such a way that he cannot reasonably be expected to live with her. The wife has denied this and instead claims that there is still life in the marriage and efforts at reconciliation have not been exhausted.

In such a divorce petition, under s. 53(2) of the said Act, the Court shall inquire into the facts alleged as causing or leading to the breakdown of the marriage and if satisfied that the circumstances make it "just and reasonable" to do so, make a decree of its dissolution. Also, in its inquiry into the facts and circumstances, the Court shall have regard to one or more of the four facts stated in s. 54(1) of the 1976 Act. Section 54(1) as stated above is the one relied upon by the petitioner.

Further, s. 54(2) enjoins the Court in considering whether it would be just and reasonable to make a decree to consider all the circumstances, including the conduct of the parties and how the interest of the child or children of the marriage may be affected if the marriage is dissolved.

The question here is what should the test be in assessing what is reasonable in the context of s. 54(1)(b) of the Act.

Held:

[1] Except for the provisions in s. 54(2) of the 1976 Act and, in part, the provisions in s. 53(2), 53 and 54(1)(a) to (c) thereof correspond substantially with s. 1(1), (2)(a) to (c) and (3) of the English Matrimonial Causes Act 1973. Therefore, the Court would apply the test taken by Dunn J in *Livingstone-Stallard v. Livingstone-Stallard* in assessing what is reasonable in the context of s. 54(1)(b) of the Malaysian Act. "Would any right thinking person come to the conclusion that this husband has behaved in such a way that the wife cannot reasonably be expected to live with him, taking into account the whole of the circumstances and the characters and personalities of the parties. Further, the language in s. 53(2) and s. 54(2) reinforces the approach taken in *Livingstone-Stallard's* case.

[2] So far as the taking into account how the interest of any child or children of the marriage may be affected, this accounting is but one circumstance that has to be considered in the totality of all the circumstances when applying the *Livingstone-Stallard* test.

[3] The question of the interest of the children does not arise here as both of them are adults.

[4] The evidence showed that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with her. The evidence *inter alia* showed that she was a suspicious woman who was so preoccupied with herself and her own affairs and she made life in the matrimonial home clearly unbearable for the petitioner. She too was unmindful of hurting the petitioner's feelings when she resorted to humiliating him in a public place and in front of their son. Her temper was so uncontrolled that he, and justifying so, anticipated violence from her. Many a time the petitioner tried to defuse the tense situation in the home by being conciliatory towards her but to of no avail. In fact, it was always the petitioner who attempts to reconciliate.

[5] Lastly, if the circumstances show a marriage can be saved it should be saved. The petitioner relies on the cumulative effect of all his complaints to prove that the marriage is dead. Although the respondent says the marriage is not dead and that all efforts at reconciliation have not been exhausted the evidence shows nothing of that sort.

[Order that marriage stands dissolved. Decree nisi to be made absolute in 3 months. Costs to the petitioner.]

Cases referred to:
Livingstone-Stallard v. Livingstone-Stallard [1974] 2 All ER 767
O'Neill v. O'Neill [1975] 3 All ER 289
Bergin v. Bergin [1983] 1 All ER 905
Buffery v. Buffery The Times, 10 December 1987

Legislation referred to:
Law Reform (Marriage and Divorce) Act 1976, ss. 53(1), 54(1)(b)

For the petitioner - Cecil Rajendra; M/s. Subbiah & Co.
For the respondent - George John; M/s. George John

JUDGMENT

KC Vohrah J:

The petitioner and the respondent, both Catholics, were married at St. Annes Church, Bukit Mertajam in 1959. They have two children from the marriage, a daughter now aged 28 years and a son 25 years.

By a petition filed on 11 March 1986 the petitioner seeks dissolution of the marriage. He says the marriage has broken down irretrievably grounding his petition for divorce under s. 53(1) of the Law Reform (Marriage and Divorce) Act 1976 (the Act) and relying on s. 54(1)(b) thereof that his wife has behaved in such a way that he cannot reasonably be expected to live with her. The wife has denied that the marriage has broken down irretrievably. She says there is still life in the marriage and efforts at reconciliation have not been exhausted.

The son of both the parties summed up the sad situation in the matrimonial home before the date of the divorce petition. "It was not a happy house". That, it would appear, was the situation for several years before the filing of the petition, and the evidence does show it was not a happy home. It was a home besetted with bitterness, strife, suspicion and tension generated by frequent violent quarrels between the petitioner and the respondent, long periods of silence between the respondent and the rest of the family, virtually daily absences

of several hours of the respondent from the home when she resided at the matrimonial home, long periods of absence of the respondent from the home on other occasions and by certain specific incidents involving the respondent.

There is dispute as to the point of time when the problems affecting the matrimonial home started but to my mind, having regard to all the evidence adduced in this case, some persistent problems manifested in the home in the late seventies, and over the years more aggravating problems piled up and these problems gravely affected the marriage. It is clear that the petitioner is relying on the cumulative effect of all these problems to show that the marriage has irretrievably broken down.

The petitioner, now 59 years old, is a government pensioner. The respondent, 47 years of age, for most part of her married life a housewife, is now a temporary sales assistant. After their marriage in 1959 they lived variously at Tapah, Sungei Siput, Kulim, Taiping, then Tapah again and eventually at Kulim again where the petitioner now resides.

The two children to the marriage, though they now live with the petitioner, were away from the matrimonial home when they entered university. The daughter was away from the house from 1981 to 1984 but she used to go home during weekends and when the university was on vacation. The son was in university from 1983 to 1987 and used to go back during vacation too. As school going children they noticed many of the incidents complained of by the petitioner and when they were home on leave from university they witnessed the further deterioration of the marriage.

According to the petitioner there were frequent violent quarrels between himself and the respondent, and that while there was no physical violence there were threats of physical violence from her. He said that on one occasion she abused him for giving a lift to a lady colleague of his and accused him of keeping her. He said he had denied it but she insisted on going to the woman's house and questioning her. The respondent and he together with their son went to that lady's house and "there was a big scene on the public road as the house was by the side of the road"; and when they returned home "she created a very big scene and had I not kept quiet matters would have got worse." According to the petitioner, on another occasion, in Taiping, she left the home for over 70 days and one afternoon she returned to the matrimonial home demanding to take her clothes. He said that as a Catholic Priest "was handling the situation then I advised her to contact the priest". He said that "she then created a big scene and threatened force so much so I had to push her out of the house." The respondent in her evidence did not deny the violent quarrels she and her husband had nor did she deny the two specific incidents where the petitioner alleged she created "big scenes" nor did she deny that she threatened to use force on him in the incident at Taiping.

Then there was the incident of tape recorder. It is not disputed that the respondent secreted a tape recorder under the altar in the home in order to secretly tape conversations between the petitioner and the two children. The respondent said that she had to do that because her husband was having the children go against her and that when she confronted him about this the petitioner told her if she did not have proof she should not have accused him; and to get proof she used the tape recorder. Whatever the reason that was proffered it was certainly offensive behaviour on her part, behaviour which further alienated her from her husband and the children. Her suspicious nature was brought out clearly by the evidence of her son that she made duplicate keys in order to go through the respondent's belongings and this was not denied by her.

The petitioner also gave evidence that the respondent used to leave the house for 4 and 5 hours daily. This was substantially the evidence of both their children. The respondent did not deny leaving the house daily - she said that it was for about 2 hours a day - but she stated that her husband knew where she was going "because my husband and children would not communicate with me." The petitioner said that he sometimes knew where she was going; she visited a family where they had a god child; but he objected to her going out for long hours. The effect of these daily absences by the respondent was characterised by the son thus, "And also there were incidents that created suspicion and hatred such as my mother going off daily.

It is common ground that on several occasions there was no communication between the petitioner and the children on the one hand and the respondent on the other. The petitioner said that "the respondent refused to communicate with me and the children for long periods." The petitioner, when asked if it was true that respondent lived separately and did not cohabit with the petitioner for several years before the filing of the divorce petition, replied that it was so and stressed that with no communication between himself and the respondent in the house, the parties had virtually nothing to do with each other. The respondent however said that the period of silence would last a day or two and the parties would then make up. The evidence of the son was, "The situation at home for past 10 to 12 years was tense - there was virtually no communication between my father and mother and also between my mother, me and my sister". He also told of the occasions when he and his sister had to pass messages between their parents and where the respondent would write messages to be sent to their father. The daughter of the parties said that her parents talked once or twice in a month but it was always her father who initiated the conversation. My view is that since the late seventies there were indeed long periods of silence between the parties and I do not believe the respondent's statement they made up after a day or two.

At this stage I think it is proper to put on record that the children of the marriage who gave evidence on behalf of the petitioner gave evidence in a straightforward and mature way. Though they now live with the petitioner and the daughter readily admits there has been no communication between herself and her mother for the last 8 or 9 years, my view is that they gave their evidence in an objective way' they reported on what they saw and heard during the years they were at home when they were school going and during the times they were home on leave from university and after graduation from university. And I have no reason to reject their evidence.

Now, coming back to the allegations of the petitioner, there is also the complaint by the petitioner that the respondent would leave the home once in two months to go to Ipoh and stay away for long periods of time. He said that the reason she gave for going to Ipoh was that she had to visit relatives. He objected to her long periods away from home; he told her to go for 4 or 5 days but she ignored him. He said that on one occasion in 1981 when they lived in Taiping she left the matrimonial home for 70 to 80 days after she had stated that she was going away to consult a lawyer for a separation. After some reconciliation efforts she returned home. On another occasion in Kulim she left the matrimonial home after some problems, saying she would be away for 14 days. She gave no reason for leaving but her absence from the home stretched to 80 days. In 1985 she went back to the matrimonial home after the petitioner referred their marriage difficulty to the local Marriage Tribunal (constituted under s. 106 of the Act). The tribunal failed in its efforts to reconcile the parties. Then a Catholic priest suggested that the respondent leave the matrimonial home for a trial period of 3 months. She left and never returned home because she said that in the meantime the

petitioner had filed the divorce petition. She agreed that the petitioner did made attempts at reconciliation after the divorce petition had been filed but she said she objected to the petitioner's suggestion that she go back to the matrimonial home for a trial period of 3 months. And why did she object? She said, "After being married for 27 years I felt no necessity for a trial period. If I was to go back it will be for good and not on a trial basis." She rebuffed the petitioner's offer for no good reason and yet she states that reconciliation efforts have not been exhausted. I shall deal more with the various efforts by various parties to reconcile the parties at a later stage.

The respondent said that her visits to Ipoh were with the approval of the petitioner and each visit would last 2 to 3 days and that she visited her mother, brothers and sisters. She said that the visits were necessary as her husband had objected to her relatives visiting her. The petitioner did state he objected to her relatives visiting the matrimonial home because, he said, they were partly the cause of their matrimonial problems. My view is that the petitioner was not exaggerating when he said she left the house for long periods of time and that while he had no objections to her visiting her relatives in Ipoh, he objected to the long periods of her absence. As regards the long period of absence in 1981 from the matrimonial home in Taiping the respondent glossed over this and said that the first time she left the matrimonial home for a long period of 70 to 80 days was in 1985 when the petitioner asked for a divorce and after she had questioned him about his changing the name in an insurance policy. The fact remains she left the matrimonial home in Kulim for a long period.

We now came to the attempts to reconcile the parties. I have already touched on some of the efforts by various parties. The evidence adduced shows that the Marriage Tribunal on 17 November 1985 certified that it had failed to reconcile the parties. The evidence also shows that the help of various Catholic priests was enlisted to no avail. Even after the divorce petition had been filed the Church tried to help reconcile the marriage but the efforts to one Catholic priest appeared futile as may be evidenced from this letter,

> 6 May 1986
>
> Dear Joseph and Rosaline,
>
> Greetings of peace of the Lord.
>
> From the meeting with both of you on 28 April at my office and from the phone conversation with Rosaline on 3 May, I feel that I will not be an effective instrument of reconciliation to your marriage problems. Therefore with effect from today (6 May 1986) I wish to end all dealings with regard to your marriage problems
>
> Please find other means to solve your problems.
>
> God bless you both.
>
> Thank you,
>
> ...

But more importantly, before the divorce petition was filed, the two parties took two trips, one to Medan, probably in 1984 or 1985, and a later trip to Bangkok for the purpose of effecting a reconciliation. The evidence of the petitioner was that he was making efforts at reconciliation but even then they had trouble; the respondent brought up unpleasant matters which had occurred the previous years. He was extremely unhappy with what had happened in Medan but he nevertheless brought her to Bangkok later to try to effect a reconciliation, again to no avail. The respondent did not touch on these aspects in her evidence.

Subsection (1) of s. 53 of the Act states that either party to a marriage may petition for a divorce on the ground that the marriage has irretrievably broken down. The Court shall, under subsection (2) of the same section, inquire into the facts alleged as causing or leading to the breakdown of the marriage and, if satisfied that the circumstances make it "just and reasonable" to do so, make a decree of its dissolution.

Further, in its inquiry into the facts and circumstances alleged as causing or leading to the breakdown of the marriage, the Court shall have regard to one or more of the four facts stated in subsection (1) of s. 54. One of them, and this is the fact on which the petitioner relies, is as specified in s. 54(1)(b):

> that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent.

Subsection (2) of s. 54, *inter alia*, enjoins the Court in considering whether it would be just and reasonable to make a decree to consider all the circumstances, including the conduct of the parties and how the interests of the child or children of the marriage or of either party may be affected if the marriage is dissolved.

Except for the provisions in s. 54(2) and, in part, the provisions in s. 53(2), above quoted, ss. 53 and 54(1)(a) to (c) correspond substantially with s. 1(1), (2)(a) to (c) and (3) of the English Matrimonial Causes Act 1973 (1973 c. 18). In particular the provisions relating to the several facts to be relied upon as proof of the breakdown of the marriage in Malaysia, s. 54(1)(a) to (c), are word for word similar to the provisions in s. 1(2)(a) to (c) of the English Act. For the present case, the fact relied on is (s. 54(1)(b) of the Act corresponding with s. 1(2)(b) of the English Act):

> that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent

In *Livingstone-Stallard v. Livingstone-Stallard* [1974] 2 All ER 767 Dunn J said at p. 771, "(I do not think) - helpful to analyse the degree of gravity of conduct which is required to entitle a petitioner to relief under s. 1(2)(b) of the 1973 Act."

Dunn J pointed out that the 1973 Act, as Lord Denning MR had emphasised in another context, is a reforming statute and the language of the subsection is very simple and quite easy for a layman to understand. In the Malaysian context, I pause here to add, the same observation can be made of s. 54(1)(b) of the Law Reform (Marriage and Divorce) Act 1976.

Dunn J then indicated the approach which the Court should use as the test in assessing what is reasonable in the context of para. (b):

> ... I ask myself the question: would any right thinking person come to the conclusion that this husband has behaved in such a way that the wife cannot reasonably be expected to live with him, taking into account the whole of the circumstances and characters and personalities of the parties.

This approach was approved and applied by the English Court of Appeal in *O'Neill v. O'Neill* [1979] 3 All ER 289. The approach in *Livingstone Stallard* and *O'Neill* was applied in *Bergin v. Bergin* [1983] 1 All ER 905 by the Family Division in respect of s. 1(c) of the English Domestic Proceedings and Magistrates Court's Act 1978, the words of which are almost identical to s. 1(2)(b) of the English 1973 Act. (See also *Buffery v. Buffery*, The Times, 10 December 1987, CA digested in [1987] Current Law Year Book, 1711).

Though there are substantial similarities between the relevant English provisions and the Malaysian provisions there does appear to be some textual difference at first sight.

Under s. 53(2) of the Malaysian Act, as was stated earlier, the Court hearing the divorce petition shall, so far as it reasonably can, inquire into the facts alleged as causing or leading to the breakdown of the marriage and if satisfied that the circumstances make it "just and reasonable" to do so, make a decree of dissolution. Section 54(2) explains as to what is "just and reasonable". It states:

> In considering whether it would be just **and reasonable** to make a decree the Court shall consider all the circumstances, including the conduct of the parties and how the interests of any child or children of the marriage or of either party may be affected if the marriage is dissolved and it may make a *decree nisi* subject to such terms and conditions as the Court may think fit to attach, but if it should appear to the Court that in all the circumstances it would be wrong to dissolve the marriage it shall dismiss the petition.

To my mind the language of these two subsections reinforces the approach taken in *Livingstone Stallard*, that the Court - in considering whether any right-thinking person would conclude that the respondent has behaved in such a way that the petitioning spouse could not reasonably be expected to live with the respondent - must take into account the whole of the circumstances and characters and personalities of the parties. So far as the taking into account how the interests of any child or children of the marriage or of either party may be affected this accounting is but one circumstance that has to be considering in the totality of all the circumstances when applying the *Livingstone - Stallard* test. In my view and bearing in mind the provisions of s. 47 of the Malaysian Act the test in *Livingstone - Stallard* - in essence, the conclusion of a right thinking man in all the circumstances - is the proper test to be adopted by this Court in this case. As far as the matter of the interest of the children, now adults, is concerned, that does not arise.

With the *Livingstone - Stallard* approach in mind it seem to me that the evidence adduced shows that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent. The evidence shows a suspicious woman who was so preoccupied with her herself and her own affairs that she made life in the matrimonial home clearly unbearable for the petitioner. She left the matrimonial home almost daily to spend time elsewhere for several hours over objections from her husband. She took time off to visit relatives in Ipoh once in two months and stayed away for long periods again over objections from her husband. It is quite clear that in the late seventies and early eighties the children of the marriage were school going children, and no right thinking man would in these circumstances ever consider the behaviour of the respondent as having been reasonable behaviour in relation to the petitioner who was then an office worker and could hardly have been expected to take care of the daily chores of the home and the needs of a school going children; the respondent certainly paid scant attention to the feelings and needs of her husband.

Then there were the frequent quarrels between the petitioner and respondent. It is not clear who started most of them or what they were about but it is clear that the petitioner tried to be conciliatory most of the times to no avail.

The respondent, too, was unmindful of hurting the petitioner's feelings when she resorted to humiliating the petitioner in a public place and in front of their son. The petitioner well remembers the incident where she abused him for giving a lift to a lady colleague of his; the respondent and the petitioner together with their son went to the lady's house by the side of a road and the respondent questioned the lady and "created a big scene in public" by

the side of the house. Her unrelenting fury directed at the petitioner continued at the matrimonial home and the petitioner said that had he not kept quiet things would have got worse. There is no doubt that this insensitive behaviour on the part of the respondent shook the petitioner and deeply wounded him.

It would appear that her temper was so uncontrolled that he, and justifiably so, anticipated violence from her. The petitioner spoke of the incident in Taiping where after a period of over 70 days absence she returned to the matrimonial home - and demanded to take her clothes from the house. He advised her to contact a Catholic priest who was trying to reconcile the parties and she created "a big scene and threatened force". So much so the petitioner had to push her out of the house. The respondent did not deny this incident.

Many a time the petitioner tried to defuse the tense situation in the home by being conciliatory towards her but his efforts were rebuffed when she refused to talk to him for long periods for several years; she talked once or twice to the petitioner after the petitioner, and it was always the petitioner, had initiated the conversation. The parties quite clearly, for most of the time, had virtually nothing to do with each other.

The respondent further exacerbated the tense and bitter relationship between the parties by stooping so low as to secretly tape conversations between the petitioner and the children. Whatever her reason for so doing that it further alienated her from the petitioner.

If the circumstances show a marriage can be saved it should be saved. The petitioner says the marriage is dead and he relies on the cumulative effect of all his complaints. Although the respondent says the marriage is not dead and that all efforts at reconciliation have not been exhausted the evidence shows nothing of that sort. The marriage has irretrievably broken down; taking into account the whole of the circumstances and the characters and personalities of the parties in this case any right-thinking person would come to the conclusion that the respondent has behaved in such a way that the petitioner cannot be expected to live with the respondent. There will be an order that the marriage stands dissolved. The *decree nisi* may be made absolute in 3 months. Costs to the petitioner.

Also found at [1989] 2 CLJ 616